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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1955.

No. 625.

JAMES C. ROGERS,
Petitioner,

vs.

MISSOURI PACIFIC RAILROAD COMPANY,
a Corporation,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Missouri.

BRIEF FOR PETITIONER.

OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of Missouri (R. 102-111), is reported as James C. Rogers, Plaintiff-Respondent, v. Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, a Corporation, Defendant-Appellant, 284 S. W. 2d 467 . . . Mo. . . . (not yet officially reported).

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

The jurisdiction of this Court is based upon the Act of Congress of June 25, 1948, c. 646, 62 Stat. 929, 28 U. S. Code, Sec. 1257 (3), providing that this Court may, by writ of certiorari, review any final judgment or decree rendered by the highest court of a State in which a decision could be had, where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under, the United States.

In this cause petitioner specially set up and claimed a right under a statute of the United States, namely, the Federal Employers' Liability Act, 35 Stat. 65, 36 Stat. 291, 53 Stat. 1404, 45 U. S. Code, Secs. 51-60 (R. 1-2). Petitioner asserts that the decision of the Supreme Court of Missouri under this federal statute is not in accord with applicable decisions of this Court.

The judgment of the Supreme Court of Missouri was entered on the 14th day of November, 1955 (R. 101-102), and became final on the 12th day of December, 1955, when the Supreme Court of Missouri overruled petitioner's motion to modify the opinion of the court and overruled petitioner's motion for rehearing and overruled petitioner's motion to transfer to the court en banc (R. 111).

Petition for writ of certiorari was filed on January 14, 1956—within ninety days after entry of judgment, in accordance with the Act of Congress of June 25, 1948, c. 646, 62 Stat. 961, amended May 24, 1949, c. 139, Sec. 106, 63 Stat. 104, 28 U. S. Code, Sec. 2101 (c).

STATUTES INVOLVED.

The statutes involved are:

45 U. S. Code, Sec. 51 (Appendix A).
45 U. S. Code, Sec. 53 (Appendix B).
45 U. S. Code, Sec. 54 (Appendix C).

QUESTIONS PRESENTED.

The questions presented for review are:

(1) Whether the petitioner who had no experience whatsoever in firing weeds along the respondent's right-of-way (R. 9) and who theretofore had never seen anyone attempting to do so (R. 9) was entitled to have the negligence of the respondent submitted to the jury where the uncontradicted evidence showed that the respondent required the petitioner (R. 12, 13, 29, 30) to be upon said right-of-way in close and dangerous proximity to a passing train of the respondent which caused the fire to blow toward the petitioner and thus to endanger his safety (R. 14).

(2) Whether the petitioner was entitled to have the jury consider the respondent's negligence in creating the aforesaid dangers, thereby causing the petitioner to retreat and move quickly from the place where he was standing while inspecting the passing train for "hot boxes" and thus to use as a place of work a part of the respondent's right-of-way covered with loose and sloping gravel which did not provide adequate and sufficient footing for the petitioner to move in a reasonably safe manner.

(3) Whether the petitioner, under the circumstances aforesaid, was entitled to have his case submitted to a jury under evidence showing that the respondent's method of work was unsafe and dangerous in that (a) the petitioner was required to burn weeds which had previously

been chemically prepared so that they would ignite rapidly; (b) the petitioner was furnished a hand torch to ignite the weeds, and the physical limitation of the hand torch required the petitioner to be in close proximity (within six feet) of the flame; (c) the petitioner was required to burn the weeds in such close proximity to respondent's tracks that air disturbance from trains passing at 35 to 40 miles per hour would blow the fire toward the petitioner; (d) the respondent did in fact operate its train at a speed of from 35 to 40 miles per hour and did cause the fire to blow toward the petitioner; (e) the respondent did not provide the petitioner with a path or other means adequate for escape from the fire; (f) the respondent continued to impose the duty upon the petitioner to stand on the west shoulder and to inspect and watch the passing train for "hot boxes."

(4) Whether the state court has narrowed the concept of "proximate cause" under the Federal Employers' Liability Act and has usurped the function of the jury in holding as a matter of law that the petitioner's injury was not proximately caused by negligence of the respondent.

STATEMENT OF THE CASE.

Under the pleadings (R. 1-4) it was admitted that the petitioner's duties as an employee of the respondent were in furtherance of the interstate commerce transportation business of the respondent and that, by reason thereof, the petitioner and the respondent were at all times herein mentioned engaged in interstate commerce and were subject to the Federal Employers' Liability Act, 45 U. S. Code, secs. 51-60.

The petitioner, 27 years old at the time of trial, married, father of one child (R. 5), brought this suit to recover damages for injuries sustained at Garner, Arkansas, through the negligence of the railroad, in failing to use

ordinary care to furnish the petitioner a reasonably safe place in which to work and a reasonably safe method of doing said work. The petitioner at the time of injury was assigned to the task of burning weeds by the use of a hand torch. He had no warning or preparation as to how to safeguard himself from the perils of fire fanned up by a passing train operated by the respondent. The injury occurred on July 17, 1951, about 11:00 A. M. (R. 6).

Petitioner's work for respondent was being performed along respondent's two main tracks, which ran north and south (R. 7). There was a shoulder west of the southbound track (R. 8) and another east of the northbound track (R. 79, 80).

The petitioner had two duties to perform at one and the same time: (1) to inspect passing trains for "hot boxes," and (2) to attend the fire then set on the shoulder. The performance of both of these duties required petitioner to be upon the west shoulder of the respondent's right-of-way (R. 12, 13).

To the south, west and north of the petitioner were weeds (R. 16) prepared for rapid ignition by chemical spray previously applied by the respondent (R. 18, 19, 27, 41). These dead weeds were thicker and taller toward the north, the direction toward which petitioner was working in burning the weeds (R. 41). A culvert was located only 30 or 35 yards north of the petitioner (R. 11). The west shoulder, on which petitioner performed his duties, was flat and three or three and one-half feet wide (R. 8, 9), offering exit from the flames, which were to the south of petitioner, only as far north as the culvert from which he fell (R. 14, 15, 36, 37). At the culvert such exit ended, and there was no flat surface or walkway on the culvert (R. 14, 15, 36, 37).

This was the first time the petitioner had ever attempted to do said work and he had never watched anyone attempt to do it theretofore (R. 9). He had been given this hand

torch only 30 to 45 minutes before the injury occurred (R. 10). The hand torch itself, which respondent furnished petitioner, was essentially a quart tin can with two spouts opposite each other and at approximately 45-degree angles from the top side of the can (R. 9). In one spout there was a 3-foot handle (R. 9, 16). In the opposite spout there was a wick of "rags and stuff" (R. 9). This type of torch was not the type used to burn weeds on the shoulders of rights-of-way (R. 10, 17, 26), but, rather, was the type used for burning small areas of grass away from the track to form clearings for the stacking of ties (R. 10).

On this occasion the petitioner "was not notified by anyone" of the approach of the northbound train involved herein (R. 15, 20). Ordinarily, the section foreman would notify his crew to clear the tracks prior to the approach of a train (R. 15). That was the foreman's job and the section crew would continue working until he called "train" (R. 15, 20).

Petitioner had been instructed by the foreman not to cross to the east when a train approached because "the sound of one train would deaden the sound of another one that possibly would come from the other way" (R. 13). He was further instructed to "always stand on the shoulder" (R. 13). The only other instructions given to petitioner were to the effect that whenever a train was passing to "put down everything" he was doing and watch for "hot boxes" (R. 12, 29, 30). Standing on the west shoulder, as he had been directed, would place the petitioner in close proximity to the tracks whereon respondent's train was moving (R. 11, 12).

When petitioner heard the whistle of a northbound train (the only notice he had) he immediately ran a distance of 30 to 35 yards to the north before he set down his torch; this was the amount of space intervening between him and the culvert that was north of him (R. 11, 13, 14). While

running to the north, the petitioner necessarily had his back to the fire which was south of him. In thus moving to the north, petitioner moved to the only direction that was open to him. He could not move to the south, because that direction was blocked by the fire (R. 28). He could not move to the west, because doing such would have placed him in weeds which were chemically prepared for burning and they were immediately adjacent to the fire (R. 18, 19, 27, 28). He could not move to the east, because he had been specifically instructed by the foreman not to stand on, or close to the adjacent track if a moving train was on the other track (R. 13). Petitioner ran the distance of 30 to 35 yards to the north in order to get far enough away from the fire to clear himself (R. 14), and when he reached this point he thought he was "plenty far enough" to clear himself of the fire "or any danger of the fire and it was time to start to watch these journals" (R. 14). He took his position on the west shoulder where he was told to stand (R. 13).

At this instant the northbound engine had already passed him (R. 14). He began watching the passing train for "hot boxes" under instructions theretofore given to him by his foreman. While thus watching for said "hot boxes" (a period of 2 or 3 seconds) approximately three or four cars went by at a rate of 35 to 40 miles per hour (R. 34). He was then overtaken by "fire right up in" his face (R. 14, 16, 21). This caused him to retreat quickly (R. 14). He threw his left arm over his face, backing away rapidly, six or eight feet onto the culvert immediately north of him, at which time he fell because of the inadequacy of the footing there provided him (R. 14, 15, 16, 23, 32, 33, 40).

The surface of the culvert was covered with a sloping substance of loose rocks or ballast (R. 15, 24, 33, 34, 38) which had been shaken down onto the culvert by the vibration of trains (R. 36). Consequently there was no flat sur-

face or walkway over the top of the culvert (R. 15, 33, 36, 38), although petitioner testified a flat pathway over culverts was customary (R. 14, 32, 36, 40), and that the section men had been instructed by the foreman to keep the culvert free from rocks "so the men would have a safe place to walk" (R. 33). This was corroborated by the foreman's testimony that the section men kept the edge of the ballast lined up straight (R. 74, 75, 76, 77, 81).

When petitioner stepped upon the crushed rock along the western part of the culvert, the crushed rock rolled out from under his feet, causing him to fall and to be injured (R. 15, 24, 30, 31). He did not and could not look to see where he was going (R. 14, 23, 24). At this point he had fire and smoke in his eyes and could not see (R. 14, 24).

The petitioner, who had no previous experience, did not know that the passing train would cause sufficient wind to fan or blow the fire (R. 14, 28). He knew the train would cause wind (R. 28), but thought the wind would not affect the fire too much because there was another track (the southbound track) between the train and the petitioner (R. 29, 11).

The foreman was aware that the weeds which he ordered the petitioner to burn were dead, having been killed by a prior chemical spray (R. 60). The foreman had a great deal of experience in doing this kind of work and had for over twenty years used a flame-thrower machine to fire the shoulders (R. 9, 26, 27, 71). This machine permits the employees to remain in a place of safety as they are stationed on a part of the machine approximately 15 or 20 yards away from the fire (R. 10). The petitioner testified that was the normal method of doing said work (R. 9). The foreman, however, testified that the flame-thrower had been discarded some years before the date of accident because it caused too much damage along the right-of-way (R. 68).

The petitioner testified he knew it was his primary duty to watch the fire (R. 30), and that he was never told "to completely ignore a fire you set" (R. 29); but the positive order to watch for "hot boxes" remained in effect and he was given no warning or instructions as to the manner of performing those two tasks simultaneously. Neither the foreman nor any other witness testified or even intimated that the petitioner's attempt to perform these two tasks was improper or different from what was expected of him.

The petitioner alleged (R. 2) "that the said method of doing said work and the place of work thus provided became and were unsafe and dangerous and defendant in thus adopting said method and furnishing said place of work, failed to exercise ordinary care and was guilty of negligence and by reason thereof, plaintiff was caused to fall and to be injured thereby all of which directly and proximately resulted, in whole or in part, from the negligence of the defendant as aforesaid."

The respondent in its answer (R. 3, 4) denied its own negligence and alleged that the petitioner's injuries were directly caused by the petitioner's own negligence and carelessness in four respects: (a) in failing to keep a lookout ahead and laterally in the direction in which he was walking (R. 4); (b) in failing to maintain secure footing in the circumstances under which he was working and performing his duties (R. 4); (c) in walking backwards or sidewards without looking in the direction in which he was walking and without ascertaining for himself the security of his own footing (R. 4); (d) in making a mis-step at a time when the petitioner was familiar with the conditions under which he was required to work and the structure of the ground upon which he was working and in thus failing to protect himself from slipping and falling (R. 4).

The respondent did not allege or claim in its answer that the petitioner was negligent in failing to "attend or watch" the fire.

The trial court submitted the case to the jury under written instructions and the jury returned a unanimous verdict in favor of the petitioner and assessed his damages in the sum of Forty Thousand Dollars ($40,000.00) (R. 97). Before it could return a verdict, the jury was required to find that the respondent was negligent in failing to use ordinary care to provide the petitioner with a reasonably safe place in which to work and a reasonably safe method of doing said work under the circumstances aforesaid (R 93, 94).

At the request of the respondent, the issue of the petitioner's alleged negligence in failing to guard properly his footsteps was submitted to the jury (R. 94). The respondent did not request the trial court to give any instructions authorizing the jury to find that the petitioner was guilty of negligence in leaving the fire "unattended and unwatched" or in creating any emergency, and no such instruction was given by the trial court of its own motion (R. 93 through 97).

The trial court accepted the verdict of the jury and entered judgment thereon. Thereafter, the respondent's motion for a new trial was overruled (R. 100). The respondent appealed to the Supreme Court of Missouri, which court reversed the judgment (R. 101, 102) holding that the petitioner had failed to make a submissible case.

SUMMARY OF ARGUMENT.

It is elemental that respondent owed petitioner the duty to use ordinary care to furnish the petitioner (1) a reasonably safe place to work and (2) a reasonably safe method of work. This duty was a continuing duty and the respondent was not relieved of its obligations because the petitioner's work at the place and by the method in question was fleeting or infrequent. Bailey v. Central Vermont R. Co. (1943), 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444.

The record contains ample evidence to sustain the jury's finding that respondent violated this duty to petitioner. The inexperienced petitioner was required by the respondent to burn weeds which had previously been chemically prepared so that they would ignite rapidly. For the purpose of igniting the weeds, respondent furnished petitioner a crude hand torch which required petitioner to be within six feet of the flame. The petitioner was required to carry on this burning operation in such close proximity to respondent's tracks that air disturbance from trains passing at 35 to 40 miles per hour would blow the fire toward the petitioner. An additional duty was imposed upon him—to stand on the west shoulder and to inspect and watch passing trains for "hot boxes." While petitioner was thus performing the concurrent and conflicting duties imposed upon him, the respondent operated its train along the said track at a speed of 35 to 40 miles per hour and caused the fire to blow upon and to overtake the petitioner. Of necessity the petitioner retreated quickly from the fire, and was caused to fall on the abnormal surface of the culvert, which was not properly maintained and which did not provide petitioner a reasonably safe path or other means adequate for escape from the fire.

In looking to the facts surrounding petitioner's injury, the combined dangers involved, the place of work, and the

method of work, cannot be detached, separated and isolated each from the other. All the factors involved must be regarded together, in the same relationship as existed at the time of petitioner's injury. Respondent's negligence in creating, through a combination of factors, the hazard which caused petitioner's injury, is not, of course, excused merely because detached elements of the hazard may not have been dangerous in themselves.

The state court's decision is the result of an independent resolution of the evidence. The practice of a lower court in reweighing conflicting evidence and substituting its own determination for that of the jury is in direct conflict with the decisions of this Court. Wilkerson v. McCarthy (1949), 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497; Lavender v. Kurn (1946), 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916; Bailey v. Central Vermont R. Co. (1943), 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444; Tennant v. Peoria & Pekin Union R. Co. (1944), 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520.

Respondent's negligence was clearly the proximate cause of petitioner's injury. Furthermore, under the Federal Employers' Liability Act, the concept of proximate cause is broadened and the employer is liable for injuries resulting "in part" from its negligence. In any event, a jury of fair-minded men could and did find that said negligence contributed "in part" to cause petitioner's injuries.

ARGUMENT.

Respondent Owed Petitioner the Continuing and Non-delegable Duty to Use Ordinary Care to Furnish Him a Reasonably Safe Place to Work and a Reasonably Safe Method of Work, and Respondent Was Not Relieved of Its Obligations Merely Because Petitioner's Work at the Place and by the Method in Question Was Fleeting or Infrequent.

This action was based on a violation of the well-recognized duty of the master to use ordinary care to furnish a servant a reasonably safe place to work and a reasonably safe method of work. The pleadings (R. 1-4), evidence (R. 5-91), and submission (R. 93-96), were to this effect.

It is elemental that the respondent owed the petitioner the duty to use ordinary care to furnish the petitioner (1) a reasonably safe place to work and (2) a reasonably safe method of work. This duty was a continuing duty and the respondent was not relieved of its obligations because the petitioner's work at the place and by the method in question was fleeting or infrequent. Bailey v. Central Vermont R. Co. (1943), 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444.

The mere fact that the petitioner was performing a task which was not of daily routine did not lessen the dangers attached thereto, nor change the above standards of law. The continuing duty of the respondent followed the petitioner wherever he might go in the course of performing the work assigned to him by the respondent.

The Record Facts Establish Respondent's Violation of Its Duty.

The record facts will show in clearest detail respondent's violation of its said duty toward petitioner. In looking to the record, of course, to determine

> "... whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given." Wilkerson v. McCarthy (1949), 336 U. S. 53, l. c. 57, 69 S. Ct. 413, 93 L. Ed. 497, l. c. 502.

Respondent imposed duties upon petitioner which required him to be on the shoulder west of the tracks (R. 10, 12, 13) with fire at least six feet south of him (the length of plaintiff's arm plus the three-foot length of the handle on the hand torch [R. 9, 16]). Petitioner was handed this improvised torch and compelled to adopt a highly dangerous method of lighting weeds which had been previously sprayed for the very purpose of causing them to ignite and burn rapidly (R. 18, 19, 27, 41). On top of all this, another duty was imposed upon petitioner—he was ordered to stand on the west shoulder in close proximity to a passing train (R. 11, 12) in order to watch for "hot boxes" (R. 12, 29, 30)—a duty which petitioner was not free to ignore since it was imposed upon him by the respondent.

This was the first time petitioner had ever attempted to perform this duty (R. 9) and he had never seen anyone else attempt to perform it (R. 9) and yet, with the inexperienced petitioner conducting a dangerous burning operation on the west shoulder, respondent then operated a train in such a direction and at such a speed as would, and did, cause the flames to blow toward the north into the

yet-unburned, taller, thicker, chemically-prepared dried weeds (R. 41). Without any prior experience, petitioner had to contend with an oncoming train which caused the fire to spread rapidly. He was afforded no opportunity for cool and collected judgment. Petitioner did not have as much warning of the approach of the train as if the foreman had called the train in accordance with the customary practice (R. 15). As soon as petitioner heard the train whistle, he was required to run away from his position immediately next to the fire in order to comply with the instruction to watch for "hot boxes." Petitioner could not move to the south and into the fire (R. 28), nor to the west, which the fire would embrace (R. 18, 19). He was prohibited by positive instructions from crossing over the tracks to the east because of the dangers incident to such crossing (R. 13). Consequently, petitioner ran to the north—to the end of the path at the culvert (R. 11, 13, 14). Petitioner thought he was a safe distance away from the fire when he was overtaken by the flames while watching for "hot boxes" on the passing train (R. 14). Of course, he did not know, and had no way of knowing, that the speed of the train and the wind therefrom would cause the intervening space to be enveloped so quickly (R. 28, 29).

Petitioner had been watching the train for only 2 or 3 seconds before he was overtaken by the flames. The uncontradicted evidence shows that only 3 or 4 cars of the train (R. 34) passed during the short period while the petitioner, pursuant to positive orders, was watching for "hot boxes." Since the train was moving at the rate of 35 to 40 mph. (R. 34) it was traveling at the rate of 51 to 59 feet per second. Therefore, it would travel 3 or 4 car lengths (120-160 feet) in 2 or 3 seconds. Only during this short interval of 2 or 3 seconds could it be said that petitioner left the fire "unattended and unwatched."

These undisputed facts, which were ignored by the state court in its opinion, are decisive of the issue that respondent created an emergency situation by compelling the petitioner to watch for "hot boxes" at a time when it was highly dangerous for him to do so. It was the imposition of these concurrent and conflicting duties that made the respondent's method of doing the work an unsafe and dangerous one. These conflicting duties were imposed upon the petitioner by the respondent at the very time when the respondent caused its train to move at such rate of speed that it did fan the fire toward the petitioner, whose place of work on the west shoulder was selected by the respondent (R. 10, 13).

Conceding that the petitioner understood that his "primary" duty was to attend the fire and that he was not told to ignore the fire completely (R. 29), it does not follow that said duty was exclusive nor that he could ignore his concurrent duty, that of watching for "hot boxes."

The various labels on duties, whether they be called "first," "primary," "positive" or anything else, must be considered and evaluated in the light of all of the circumstances present. Of necessity, for a two or three second interval, the petitioner was required to give attention to one duty rather than to the other. To illustrate: A locomotive fireman is under the duty to watch his boiler and the amount of steam that is coming up and at the same time is under the duty to keep a lookout while approaching public crossings. It could well be said that the duty of watching the boiler and the steam is his "primary" or "first" duty. On the other hand, we know that the safety of the train and its passengers, as well as the safety of the public, depends upon the performance of his "positive" duty to keep a vigilant watch while approaching public crossings. Can it be said that while the fireman is looking out of the window for two or three seconds in the perform-

ance of his "positive" duty, he is guilty of negligence in not performing the "primary" duty of watching the steam during that very same interval of time? The answer is "No," because of the very nature of the duties. A jury must appraise an employee's conduct in the light of all the circumstances in evidence. It must be remembered, too, that the petitioner who was not even charged with negligence in leaving the fire "unattended and unwatched" cannot have his recovery defeated by contributory negligence.

Having created, by its negligence in failing to provide petitioner a reasonably safe place in which to work and a reasonably safe method of doing said work, the emergency situation in which petitioner found himself, when the fire, fanned by the swift moving train, overtook him, respondent compounded its negligence by its failure to provide petitioner with a path or other means adequate for escape from the fire. When the fire came right up in petitioner's face (R. 14) he was caused to retreat quickly (R. 14). He threw his left arm over his face, backed away rapidly, six or eight feet onto the culvert immediately north of him. While thus backing away, petitioner did not and could not look to see where he was going (R. 14, 23, 24), because at this time he had fire and smoke in his eyes and could not see (R. 14, 24). Under the circumstances, petitioner might well have jumped, rolled, dived or done anything else in order to save himself from the ravages of the fire. He could not be expected to stand still and burn. However, he did not jump but moved onto the culvert where he had a right to expect a haven of safety. There petitioner was caused to fall because of the abnormal condition of the culvert due to the sloping crushed rock placed upon it and the absence of a customary flat surface or walkway (R. 15).

And respondent, in its answer (R. 4), has singled out this fleeting instant—while petitioner was hurrying, with

smoke-filled eyes, to escape the hot breath of the fire, which was already right up in his face—for its only assertion of contributory negligence, which was directed at petitioner's foot work in this perilous moment.

Just plain common sense tells us that one who is exposed to the perils of fire in the performance of any duty should be provided with a reasonably safe avenue of escape. Certainly any prudent person would reasonably anticipate that when a train causes the fire to blow on an employee who is required to stand in close and dangerous proximity to said train that he might have to retreat quickly therefrom or else be consumed thereby. The shoulder and pathway were the same to the petitioner as the fire escape on a hotel building is to anyone lodged therein. It would be absurd to say that the hotel owner does not have to use ordinary care to maintain a fire escape in reasonably safe condition simply because said owner does not know when, where or how a fire will start.

Certainly the record facts, as outlined above, contain an abundance of evidence to support the trial court judgment in favor of petitioner. It was, and is, petitioner's theory of liability that his place of work was unsafe considering the nature, type and method of work. It was also petitioner's theory that the method of work was unsafe considering the place where it was to be done. This twofold theory was submitted, in the conjunctive, to the jury (R. 93).

Petitioner's **place of work** necessarily included (1) the shoulder west of the tracks and the dead, dried, highly inflammable burning weeds located thereon, north to the point on the culvert where plaintiff sustained his injuries; (2) the culvert on which a slope of crushed, loose rock was the only possible route of escape from fire blown north-

wardly along the aforesaid west shoulder. Clearly the evidence established, and the jury was entitled to find, that the place of work thus furnished petitioner was not reasonably safe; that respondent was negligent in furnishing the place of work; and that petitioner sustained injuries as a result of respondent's negligence.

And, looking to the other side of the coin, the evidence showed that respondent's **method of work** was unsafe and dangerous in that (a) the petitioner was required to burn weeds which had previously been chemically prepared so that they would ignite rapidly; (b) the petitioner was furnished a hand torch to ignite the weeds, and the physical limitation of the hand torch required petitioner to be in close proximity (within six feet) of the flame; (c) the petitioner was required to burn the weeds in such close proximity to respondent's tracks that air disturbance from trains passing at 35 to 40 miles per hour would blow the fire toward the petitioner; (d) the respondent did, in fact, operate its train at a speed of from 35 to 40 miles per hour and did cause the fire to blow toward the petitioner; (e) the respondent continued to impose the duty upon the petitioner to stand on the west shoulder and to inspect and watch the passing train for "hot boxes"; (f) the respondent did not provide petitioner with a path or other means adequate for escape from the fire. Surely, then, the jury could find that the six items listed above cumulatively constituted the method of work which respondent furnished petitioner; that the method of work was not reasonably safe at the place where it was employed; that respondent was negligent in furnishing the method of work; and that petitioner sustained injuries as a proximate result of respondent's negligence.

The state court, however, ignored the manner, method, place and environment in which the petitioner was then and there required to use the torch, shoulder, pathway and

culvert, and disposed of the vital issues—whether the respondent exercised ordinary care to furnish the petitioner a reasonably safe place in which to work and a reasonably safe method of work—simply by holding that the hand torch, in itself was safe and did not make the fire dangerous (R. 110), and that the pathway and culvert were not unsafe for ordinary uses under ordinary circumstances (R. 110).

Such a simplification of the issues is unjustified. The petitioner does not contend that the hand torch alone endangered his safety. The other facts and circumstances in evidence and their peculiar nature cannot be disregarded. The petitioner, an inexperienced employee, was told to stand on the west shoulder. He was instructed to watch the passing train for "hot boxes." This necessarily brought him into close and dangerous proximity to the passing train. He did not know the dangers attached to this work and had received no warnings or any other preparation for it. While thus following instructions, he was imperiled by the fire and flames which were blown toward him by the passing train controlled by the respondent. His peril was caused by three things: (1) respondent's demand that the inexperienced petitioner stand and work upon the west shoulder in close proximity to the tracks upon which a train was then and there being operated while the weeds were burning nearby; (2) respondent's sending a train, under the circumstances aforesaid, at such rate of speed that it did cause the fire to fan and spread rapidly; and (3) the failure of the respondent to provide any reasonably safe means of escape.

The state court's faulty conclusions are due to the fact that it detaches and separates (1) the combined dangers involved, (2) the place of work and (3) the method of work each from the other. By this process it was able to say that the torch in and of itself was not dangerous; the

train was perfectly safe: **the culvert was adequate for ordinary purposes.** These truisms take on a different meaning, however, when we consider the manner in which they were being used at the time of petitioner's injury. For illustration, a cow is a docile animal; an oil lantern is a simple appliance; barns are commonplace structures; but we learned through Mrs. O'Leary that they cannot be used successfully in close and dangerous proximity to each other.

The Issue of Negligence Was for a Jury's Determination.

The state court's independent resolution of the evidence was illogical, an invasion of the province of the jury, and in direct conflict with the decisions of this Court. In the words of Mr. Justice Black, in Wilkerson v. McCarthy, supra,

> "its finding of an absence of negligence on the part of the railroad rested on that court's independent resolution of conflicting testimony" (336 U. S. 53, l. c. 55).

The decisions of this Court have made crystal clear a state court's path of duty with reference to the jury's function. The applicable rule of law was authoritatively stated by Mr. Justice Murphy in Lavender v. Kurn (1946), 327 U. S. 645, l. c. 653, 66 S. Ct. 740, 90 L. Ed. 916, l. c. 923:

> "Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But

where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion.

"And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

This Court expounded the same principles in Wilkerson v. McCarthy, supra:

"This Court has previously held in many cases that where jury trials are required, courts must submit the issues of negligence to a jury if evidence might justify a finding either way on those issues. . . . It was because of the importance of preserving for litigants in FELA cases their right to a jury trial that we granted certiorari in this case" (336 U. S. 53, l. c. 55).

In Bailey v. Central Vermont R. Co., supra, Mr. Justice Douglas declared:

"The jury is the tribunal under our legal system to decide that type of issue . . . as well as issues involving controverted evidence. . . . To withdraw such a question from the jury is to usurp its functions.

"The right to trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence.' Jacob v. New York, 315 U. S. 752, 86 L. Ed. 1166, 62 S. Ct. 854. It is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act. Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. . . . To deprive

these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them" (319 U. S. 350, l. c. 353-354).

The similarity between the theories of recovery relied on and the evidence in support thereof in the case at bar and in the Bailey case, supra, is indeed striking, as evidenced by paraphrasing a portion of the opinion in the Bailey case:

> "The nature of the task which *Rogers* undertook, the hazards which it entailed, the effort which it required, the kind of footing he had, the space in which he could stand . . .—all these were facts and circumstances for the jury to weigh and appraise in determining whether respondent in furnishing *Rogers* with that particular place in which to perform the task was negligent. The debatable quality of that issue, the fact that fair-minded men might reach different conclusions, emphasize the appropriateness of leaving the question to the jury" (319 U. S. 350, l. c. 353). (Words in italics paraphrased.)

See also Tiller v. Atlantic Coast Line R. Co. (1943), 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610; Schulz v. Pennsylvania R. Co. (1956), 350 U. S. 523, 100 L. Ed. 430, 76 S. Ct. 608.

This Court has deplored and condemned the practice of a lower court in reweighing conflicting evidence and substituting its own determination for that of the jury:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is

the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. . . . That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.'' Tennant v. Peoria & Pekin Union R. Co. (1944), 321 U. S. 29, l. c. 35, 64 S. Ct. 409, 88 L. Ed. 520, l. c. 525.

Respondent's Negligence Was the Proximate Cause of Petitioner's Injury Under the Federal Employers' Liability Act.

Certainly there should be no question as to the causal relationship between respondent's negligence and petitioner's injury in view of the broadened concept of "proximate cause" under the Federal Employers' Liability Act.

"The statute does not attempt to legislate upon the purely logical problem of determining the cause or causes of injury, but directs its mandate towards the problem of fixing liability for the injury. Logic may conclude that the injury resulted from the negligence of the employer, the employee's own want of care, the default of a stranger to the employment, an act of God, or pure accident, or from a combination of any or all of these factors. But after logic has thus de-

termined the causal basis of the injury, the statute steps in to say that if, among these causes, there is negligence on the part of the employer, as that term is understood in the act, liability of the employer shall follow, irrespective of the other factors causally related in whole or in part from negligence, even if the negligence of the injured employee or some other factor was logically nearer to, or more influential in producing that injury. In the words of Mr. Justice Holmes: 'We must look at the situation as a practical unit, rather than inquire into a purely logical priority.' " The above quotation is from Roberts, "Federal Liabilities of Carriers," Sec. 869, as found in Eglsaer v. Scandrett et al. (7 Cir., 1945), 151 F. 2d 562, l. c. 565, in which that court further states:

The statute "provides that if the railroad's negligence '*in part*' results in the injuries or death, liability arises. Under the old concept of proximate cause, that cause must have been direct, the complete, the responsible, the efficient cause of the injury. Contributing and remotely related causes were not sufficient. Now, if the negligence of the railroad has 'casual relation'—if the injury or death resulted '*in part*' from defendant's negligence, there is liability.

"The words 'in part' have enlarged the field or scope of proximate causes—in these railroad injury cases. These words suggest that there may be a plurality of causes, each of which is sufficient to permit a jury to assess a liability. If a cause may create liability, even though it be but a partial cause, it would seem that such partial cause may be a producer of a later cause. For instance, the cause may be the first acting cause which sets in motion the second cause which was the immediate, the direct cause of the accident" (151 F. 2d 562, l. c. 566).

We believe that the state court's conclusion of law and fact that respondent's negligence was not the cause of the petitioner's injuries was invalid under the evidence and under any definition of "proximate cause." Certainly, a jury of fair-minded men should be permitted to find under the statute that respondent was negligent and that said negligence contributed "in part" to cause the petitioner's injuries.

The State Court's Opinion.

Inasmuch as this matter is before this Court because of petitioner's claim that the opinion of the Supreme Court of the State of Missouri (R. 102-111) is erroneous, we deem it our duty to point out the errors into which the state court fell.

A. The state court, in asserting that petitioner was injured through an emergency brought about by himself in leaving the fire "unattended and unwatched" (R. 110), based its opinion upon a theory not raised by the pleadings (R. 1-4) or the evidence (R. 5-91) and an issue that was not submitted to the jury (R. 93-97). This conclusion was not warranted by the evidence. The record facts show that petitioner, while running north thirty to thirty-five yards in an effort to get far enough away to clear himself of the fire (R. 14), necessarily had to have and did have his back to the fire; that he then stood on the west shoulder **where he was told to stand** (R. 13) for only two or three seconds before he was overtaken by the flames; that during this few seconds' interval he was following the instructions of the respondent theretofore given him "to put down everything" and watch for "hot boxes" on the passing trains (R. 12, 29, 30).

B. The state court erred in detaching and separating the combined dangers involved, the place of work and the

method of work each from the other. The state court thus erroneously assumed that all of respondent's obligations under the law were fulfilled merely because (1) the pathway and culvert were reasonably safe for men using the same under circumstances **different** from those which confronted the petitioner on the occasion in question; (2) the hand torch in and of itself was not a dangerous instrumentality; and (3) the operation of the train, under **ordinary** circumstances, was safe. The state court thus failed to appreciate that, although the detached elements of the hazard may not have been dangerous in themselves, extreme danger resulted from the combination of the elements. In isolating and detaching the factors which lead to petitioner's injury, the state court ignored the manner, method, place and environment in which the petitioner was then and there required to work. The relationship of these elements is established by the evidence and their separation is unjustified as well as illogical.

C. The state court, in deciding that petitioner's injuries were not related to the negligence of the respondent, not only usurped the province of the jury, but it failed to recognize the broadened concept of "proximate cause" under the Federal Employers' Liability Act. As we discussed at some length above, the concept of proximate cause under the Federal Employers' Liability Act is enlarged by the wording of the statute and makes the employer liable for his negligence, even though some other factor may logically be said to be more influential in producing the injury. Certainly the evidence permitted a jury of fair-minded men to find under the statute that respondent was negligent and said negligence contributed "in part" to cause petitioner's injuries.

CONCLUSION.

For the reasons herein given, petitioner respectfully submits that the judgment of the Supreme Court of Missouri should be reversed with directions that the judgment of the trial court be affirmed.

Respectfully submitted,

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APPENDIX A.

Liability of Common Carriers by Railroad, in Interstate or Foreign Commerce, for Injuries to Employees From Negligence; Definition of Employees.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. April 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404; 45 U. S. Code, Sec. 51.

APPENDIX B.

Contributory Negligence; Diminution of Damages.

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. April 22, 1908, c. 149, Sec. 3, 35 Stat. 66; 45 U. S. Code, Sec. 53.

APPENDIX C.

Assumption of Risks of Employment.

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. April 22, 1908, c. 149, Sec. 4, 35 Stat. 66; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404; 45 U. S. Code, Sec. 54.